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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 705

PETROLEUM EXPLORATION, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF KENTUCKY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

C. N. KIMBALL,
W. J. BRENNAN,
E. C. O'REAR,
ALLEN PREWITT,
Counsel for Appellant.

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No. 705

PETROLEUM EXPLORATION, A MAINE CORPORATION,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF KENTUCKY ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

Filed Jan. 6, 1938.

(a)

Jurisdiction of the Supreme Court.

This appeal is prosecuted under U. S. C. title 28, Sections 345 and 380, from a decree of a United States District Court of three judges assembled under section 380.

(b)

The Statute and Administrative Orders Involved.

There is involved the validity of the "Public Service Commission Act" adopted by the legislature of Kentucky as it is applied to the appellant, who was the plaintiff below. Primarily, there is involved the validity of certain administrative orders of the Public Service Commission of Kentucky directed against appellant.

The Act—It is officially printed as chapter 145 of the *Kentucky Acts of 1934,* effective June 14, 1934, as amended by chapter 92 of the *Kentucky Acts of 1936,* effective May 16, 1936. Also, it appears as Sections 3952-1 to Sections 3952-61, inclusive, of *Carroll's Kentucky Statutes, 1936 Edition,* cited as "Ky. Stats., 1936." Its general purpose was to create the Public Service Commission of Kentucky, called the "commission," as an agency of that Commonwealth with power to regulate the rates and practices of certain businesses defined as public utilities, called "utilities." Its pertinent provisions may be summarized as follows:

Utilities—The Act defines as a utility or utilities, *inter alia,* any corporation that may own, control, operate or manage any facility used "for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other purposes; any facility used or to be used for or in connection with the transportation or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *." (Ky. Acts 1936, c. 92, section 1; ib., 1934, c. 145, Sec. 1; Ky. Stats. 1936, Sec. 3952-1.)

The Commission—The Act establishes the commission as an administrative body corporate composed of three members appointed by the Governor, and authorizes it to sue and

be sued in its corporate name (Ky. Acts 1934, c. 145, Sec. 2; Ky. Stats. 1936, Sections 3952-2, -3.)

General Powers—It extends the jurisdiction of the commission to all utilities enumerated by the Act. It authorizes the commission to investigate utilities, to require them to conform to its lawful and reasonable rules, regulations and orders. It gives the commission power to require of utilities "information desired by the commission relating to any investigation or requirement." The commission may compel obedience to its lawful orders by mandamus or injunction or other proceedings in the Franklin Circuit Court of Kentucky or other court of competent jurisdiction (Ky. Acts 1934, c. 145, Sec. 4a,-4b; Ky. Stats. 1936, Sections 3952-12,-13).

Investigation and Rate Changes—Whenever after a hearing on reasonable notice, in an investigation (Ky. Acts 1934, c. 145, Sec. 6 (a); Ky. Stats. 1936, Sec. 3952-33), the commission finds that any existing rates, joint rates, tariffs, tolls or schedules are unjust, unreasonable, insufficient or unjustly discriminatory, the commission shall by order require just and reasonable rates, etc. (Ky. Acts 1934, c. 145, Sec. 4(c) 1; Ky. Stats. 1936, Sec. 3952-14).

Contract Rates—The Act purports to authorize the commission after a hearing to abrogate any charges, tolls, schedules or service standards of any utility that are now fixed or that in the future may be fixed, by any contract, franchise or otherwise "between any municipality and any such utility." (Ky. Acts 1934, c. 145, Sec. 4(n); Ky. Stats. 1936, Sec. 3952-27.)

Elements of fair value—The commission is authorized to ascertain and fix the value of the property of any utlity for all such purposes. In so doing, "it shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law

of the land for rate making purposes. (Ky. Act 1934, c. 145, Sec. 4(f); Ky. Stats. 1936, 3952-19.)

Burden of Proof—In all cases, it is on the party complaining of any order or direction of the commission (Ky. Act 1934, c. 145, Sec. 7(f); Ky. Stats. 1936, 3952-49).

Procedure—The Act provides for the initiation of investigations upon complaint or upon the commission's own motion; for hearings, for application for a rehearing of "any determination made by the commission in any hearing"; and for keeping a complete record of all contested proceedings (Ky. Acts 1934, c. 145, Sections 6a to 6k, inclusive; Ky. Stats., 1936, Sections 3952-33 to 3952-43, inclusive).

Court Review—Any party affected by an order of the commission may within 20 days after service upon it of a copy of such order or of the order overruling any petition for rehearing commence an action against the commission in the Franklin Circuit Court of the State or in any other court of competent jurisdiction to vacate or set aside such order on the ground that it is unlawful or unreasonable. No new evidence shall be heard by the court, but it may remand the matter to the commission to hear newly discovered evidence. (Ky. Acts 1934, c. 145, Sections 7(a), 7(b); Ky. Stats. 1936, Sections 3952-45.)

Penalties—Every officer, agent or employee of any enumerated utility who shall willfully violate any provisions of the Act, or who aids or abets any violation thereof by such utility, shall upon conviction be fined not more than $1,000.00 or imprisoned not longer than six months or both.

Any enumerated utility violating the Act or failing, neglecting or refusing to obey any lawful order or requirement of the commission, for every such violation, failure or refusal shall forfeit to the State not less than $25, and not more than $1,000, for each such offense. Whenever a utility is subject to such penalty, the commission shall certify the

acts to the Commission Counsel (*ex officio,* an assistant Attorney General), who shall institute an action in the Franklin Circuit Court of Kentucky in the name of the Commonwealth of Kentucky, for its recovery. With the court's consent, the commission may compromise such actions.

The Orders.

The primary order of the commission, the validity of which is involved, is as follows:

"NOTICE OF INVESTIGATION AND ORDER TO SHOW CAUSE

"WHEREAS, An examination of the reports of several wholesale and retail gas utilities serving in this State, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

"WHEREAS, The Commission has found under Sections 3952-1-12-13, and 14, that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

"WHEREAS, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

"WHEREAS, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

"WHEREAS, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

"NOW, THEREFORE, NOTICE IS HEREBY GIVEN, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on

June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"WHEREAS, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

"NOW, THEREFORE, IT IS ORDERED:

"1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

"2. That the Petroleum Exploration, Inc., submit at such hearing, a complete statement of all contracts, agreements, and working arrangements between said company and any corporation, partnership, trust, association, or person which controls, directly or indirectly, said company, or which is under domination and control of the interests which control Petroleum Exploration, Inc.

"3. That the Petroleum Exploration, Inc., file with the Commission on or before June 29, 1937, a complete and accurate statement of charges appearing on the books of said company for the years 1934, 1935 and 1936, representing payments made or obligations incurred by said company to any such corporation, partnership, trust, association, or person as defined under (2) above, together with the name and address of the party with whom said charge first originated and the actual cost to such party for rendering the service for which said charge was made, and a detailed explanation of the nature of the service performed and by whom performed. Said statement shall include a detailed classification of such charges showing separately

such class of service and the charges therefor and amounts cleared to each account.

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

"NOTICE IS HEREBY GIVEN to the Petroleum Exploration, Inc., of the above order of the Commission.

"Dated at Frankfort, Kentucky, this 29th day of May, 1937.

(S.) CHAS. J. WHITE,
[SEAL.] *Secretary.*"

Subsequent orders of the commission overruled the plea of Petroleum Exploration to the jurisdiction of the commission, set the investigation for formal hearing on July 29, 1937, and (after the institution of this suit) overruled a petition for a rehearing of the question of jurisdiction, and reset the investigation for December 7, 1937.

(c)

Date of Decree and of Application for Appeal.

The decree sought to be reviewed is dated the 6th day of January, 1938. The application for appeal is presented the 6th day of January, 1938.

(d)

Nature of the Case.

1) *Federal jurisdiction*—Plaintiff, Petroleum Exploration, Inc., is a corporation organized under the laws of the State of Maine. The defendant commission is a Kentucky body corporate and its defendant members are citizens and residents of that State. More than $3,000.00 is in controversy, exclusive of interest and costs. Also, the case arises under the Constitution of the United States.

2) *Equity jurisdiction*—Because various material recitals in the orders of the commission are contrary to the facts and for other, affirmative reasons stated on the merits, plaintiff maintains that under the 14th Amendment to the Constitution of the United States it is not subject to the investigation ordered by the commission and which it seeks to enjoin. Without its showing being questioned, plaintiff establishes that the necessary expense of such investigation to it would be approximately $25,000, exclusive of attorney fees. Such sum would be required in ("conclusively") sustaining the fairness or reasonableness of the prices plaintiff receives for natural gas by the prescribed evidences (see "b" hereof, "elements of fair value", pp. 3-4).

Plaintiff has not recourse at law or otherwise for the recovery of this large sum or any sum spent by it in an unauthorized and hence fruitless investigation by the commission.

In their verified answer, filed by the Attorney General, who is the chief law enforcement officer of the State, defendants admit they, notwithstanding a petition for rehearing then undetermined by them, threatened to proceed upon their order of investigation hereinbefore set out and would have done so but for the temporary restraining order obtained by plaintiff in this case, and aver "that said proceeding would have been lawful, reasonable, useful and needful." Upon disobedience in such case, the Act mandatorily requires the defendants to institute proceedings in the State court to recover the prescribed forfeitures. Also, according to these statements of the commission, it follows that plaintiff's officers, agents and employees aiding or abetting in its failure to heed the commission's orders, are mandatorily liable under the Act to either fine or imprisonment or both (see "b" hereof "penalties", p. 4).

By a divided bench, the District Court held that plaintiff has an adequate remedy at law in the State courts, denied

interlocutory and final injunctions and dismissed the bill for supposed want of equity. It held that plaintiff's right to interpose its constitutional defenses to mandamus or penal actions against it in the State courts to enforce an unlawful or unauthorized investigation is an "adequate remedy".

Such remedy in the State courts is not of a character afforded under any circumstances by the Federal Courts of law. (U. S. C. title 28, Section 384; *Smyth* v. *Ames*, 169 U. S. 466, 516, 42 L. Ed. 819, 838, 18 Sup. Ct. Rep. 418; *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 74 L. Ed. 737, 749, 50 Sup. Ct. 270.)

The Federal District Courts of law have no general jurisdiction of original mandamus suits, (*U. S.* v. *Lake Shore, etc., Co.*, 197 U. S. 536, 49 L. Ed. 870; *Covington, etc., Bridge Co.* v. *Hager*, 203 U. S. 109, 51 L. Ed. 111; not removable, *State* v. *White River, etc., Ry. Co.*, 27 S. D. 69, 129 N. W. 1036.)

The Federal District Courts of law could not entertain penal actions or prosecutions brought in the name of the Commonwealth of Kentucky (U. S. C. title 28, Section 341).

Rules of comity or convenience do not require plaintiff to litigate purely constitutional defenses in the state courts at the risk of losing its right to come afterwards to the district court of the United States by reason of the matters having become *res adjudicata* (*Oklahoma Gas Co.* v. *Russell*, 261 U. S. 291, 293, 67 L. Ed. 659, 43 Sup. Ct. 353).

Also, plaintiff is entitled to the determination of constitutional rights without meanwhile being in peril of losing upwards of $20,000 required in the investigation or risk of forfeitures, or its officers, agents or employees being placed in fear of fine and imprisonment (cf. *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 57 L. Ed.

1507, 33 S. Ct. 961; *New Hampshire Gas & Electric Co.* v. *Morse*, 42 F. (2d) 490, 495).

3) *The "Johnson Act"*—The Act of May 13, 1934, was not considered applicable by the two concurring judges of the District Court, so we were informed. That Act withdrew the jurisdiction of the court only if the commission's order "affects rates chargeable by a public utility", and was made after a "hearing". (May 14, 1934, c 283, Sec. 1, 48 Stat. 775; Judicial Code, Sec. 24, amended; U. S. C., Title 28, Section 41-1). The suit is not levelled at an order as "affecting rates," but at an unauthorized and otherwise unlawful investigation (cf. *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 60 L. Ed. 984, 36 S. Ct. 583, Ann. Cas. 1916 D 765). Also, a primary question on the merits is whether plaintiff is acting as a public utility severally in respect of its sales of gas to three wholesale buyers—the Act in terms assumes public utility status. Furthermore, it is expressly confessed in answer by the defendants that their orders were rested not on evidence adduced at a hearing after notice, but on "merely statements made by the commission based on the general information of the members of said Commission." Thus, they were not made after a "hearing", as conditioned by the Johnson Act. (cf. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 71, 79 L. Ed. 761, 769; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.* (1913), 227 U. S. 88, 93-4, 57 L. Ed. 431, 434).

Statutory Review—Though no supersedeas is provided by the Act, if plaintiff's remedy was by suit under the Act to vacate the order (Ky. Acts 1934, c. 145, Sections 7 (a), 7 (b), Ky. Stats., 1936 Ed., Section 3952-44), such proceeding is judicial and is assimilable to the usages of the district courts of the United States (*Cowley* v. *Northern P. R. Co.* (1895), 159 U. S. 569, 40 L. Ed. 263, 16 Sup. Ct. Rep.

127; *Louisville & N. R. Co.* v. *Western U. Telg. Co.* (1914), 234 U. S. 369, 58 L. Ed. 1356, 34 Sup. Ct. Rep. 810; *Commissioners, etc.*, v. *St. Louis Southwest Railway Co.*, 257 U. S. 547, 66 L. Ed. 364). In the alternative the bill prays a vacation of the order. If vacation of the order and not injunction was plaintiff's remedy, it was ground for dissolving the three judge court, but not for dismissing the bill (cf. *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088).

4) *The Merits*—The order of investigation offends due process and is unauthorized for the following reasons:

(i) Plaintiff produces and sells natural gas at wholesale only, and to three particular buyers. It does so under formal, written contracts all antedating the Public Service Commission Act of Kentucky, and having nine years upwards to run. It prays several relief in respect of its sales to each, viz., Central Kentucky Natural Gas Company of Kentucky, called the "Central Company", Edwards & Eversole Gas Company, a copartnership of Edwards and Eversole, and Peoples Gas Company of Kentucky, called the "Peoples Company".

It has gas producing leases in Owsley, Jackson and Clay Counties, Kentucky, from which it produces and delivers gas to the Central Company at the corporate limits of the towns of Lexington, Richmond and Irvine, Kentucky. The gas is delivered from the gas leases by transmission pipes laid across lands pursuant to grants from the landowners of rights of way for the purpose, a delivery system known as plaintiff's "Lexington line". Plaintiff produces and owns all gas transmitted through this line. Plaintiff sells to the Central under two contracts fixing the price and made "at arm's length" seven years prior to the Public Service Commission Act of Kentucky and having ten years yet to run. No sort of affiliation or control, direct or remote, has

ever existed between vendor and vendee in these two wholesale contracts.

Plaintiff's business of wholesaling natural gas specially to the Central Company is not public utility [1] and defendants may not by fiat of their order treat it as such, contrary to the due process clause of the 14th Amendment.[2] Though our research does not disclose that the Supreme Court has directly decided the question, we construe that the Court has assumed that such single wholesaling at arm's length is not public utility. (*Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119, 127, 76 L. Ed. 655—headnote 4; *Dayton Power & Light Co.* v. *Public Utilities Commission,* 292 U. S. 290, 308, 78 L. Ed. 1267, 1279—headnote 15).

Also, plaintiff has a similar but separately operated pipe line from its Clay County, Kentucky, gas leases to the corporate limits of Somerset, Kentucky, with branch lines to the corporate limits of Manchester and London, Kentucky, called its "Somerset Line". It likewise produces and owns all the gas transmitted through this line. It sells a portion to Edwards & Eversole, under a contract similarly made at arm's length. Neither has any affiliation or control ever existed between plaintiff and Edwards & Eversole, and plaintiff likewise contends that this business is not public utility.

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[1] *Nowata County Gas Co.* v. *Henry Oil Co.* (8th C. C. A.), 269 Fed. 742; *Texoma Natural Gas Co.* v. *Railroad Commission of Texas,* 59 F. (2d) 750; Accord: *Southern Ohio Power Co.* v. *Public Utilities Commission* (Ohio Sup.), 143 N. E. 700, 34 A. L. R. 71; *United States* v. *Uncle Sam Oil Co.,* 234 U. S. 548, 651-2, 58 L. Ed. 1459, 1471, Syl. 4; *State of Washington, etc.* v. *S. & I. E. R. R. Co.,* 89 Wash. 599, 154 Pac. 110, L. R. A. 1918 c. 675; *Chippewa Power Co.* v. *Railroad Commission* (Wis. 1925), 205 N. W. 900; *Gully* v. *Interstate Natural Gas Co.,* 4 F. Supp. 697, 8 F. Supp. 174, 82 F. (2d) 145, 150.

[2] *Michigan Public Utilities Commission* v. *Duke* (1925), 266 U. S. 570, 577-8, 69 L. Ed. 445, 45 Sup. Ct. 191.

Plaintiff sells the remainder of the gas from its Somerset line to its other customer, Peoples Gas Company of Kentucky, at the corporate limits of Somerset and Manchester, Kentucky. It also has a similar pipe line from its Knox County gas leases, known as its "Knox County line," to the corporate limits of Barbourville and Corbin, Kentucky, from which it wholesales gas to this Peoples Company at those places. In addition to the gas produced from its Knox County leases, plaintiff purchases in the field a small quantity of gas transmitted through this line and owns all the gas conveyed through it. Plaintiff owns 25/32nds of the capital stock of the third customer, the Peoples Company. The Commission is without jurisdiction to regulate the wholesale prices charged by the appellant to its affiliate, Peoples Gas Company of Kentucky, as that would be an unwarranted interference with private inter-company transactions contrary to the due process clause, whatever might be the power of the Commission to regulate the rates at which the affiliate distributes gas to the public, allowing a reasonable charge for gas so purchased as an operating expense of the affiliate, which, however, could divide the revenues received from the public with the appellant as they saw fit (*United Fuel Gas Co.* v. *Railroad Commission* (1929), 278 U. S. 300, 320-1, 73 L. Ed. 390, syl. 14). Nevertheless, were the sales to this affiliate public utility ones, that fact would not so render the others made at arm's length to the two companies that are strangers (cf. *Terminal Taxi Cab Co.* v. *Kutz* (1916), 241 U. S. 252, 60 L. Ed. 984).

(ii) Plaintiff also contends that the order is unauthorized by the Act in that it does not sell or distribute gas "to" the public. Nor, does its produce or transmit natural gas "for" the public as contemplated by the statute. Nor is a special contract price with a wholesale buyer properly a "rate." (*State of Washington* v. *S. & I. E. R. R. Co.*, 99 Wash. 599,

154 Pac. 110, L. R. A. 1918, c. 675; *Chippewa Power Co.* v. *Railroad Commission* (Wis. 1925), 205 N. W. 900.) But, if in error in construing the statute, it offends due process as does the commission's order.

(iii) Each of the three wholesale buyers from the plaintiff distributes and retails the gas to the public in the municipality at which delivered, except that gas delivered at Irvine is also distributed in the contiguous town of Ravenna. In each municipality the buyer resells the gas pursuant to a franchise contract existing between such distributor and the municipality, granted by the municipality pursuant to Sections 163 and 164 of the Constitution of Kentucky. In each the municipality by the authority of those sections, in reference to the franchise, and in its proprietary capacity, entered into a contract with the grantee fixing the rates to be charged by the grantee and his/its assigns for gas distributed in the municipality pursuant to the franchise and effective during the term thereof, save in the case of Lexington such rates were originally fixed by a separate contract and thereafter incorporated into the franchise by amendment effective to March 1, 1939. The several franchises have from nine years upwards yet to run; and all the incidental rate contracts were entered into before the Act.

Section 164 of the Kentucky Constitution has been construed in numerous decisions of the Court of Appeals of Kentucky [3] as vesting in a municipality "specific authority"

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[3] *Moberly* v. *Richmond Telephone Co.* (1907), 126 Ky. 369, 103 S. W. 714; *Louisville Home Telephone Co.* v. *City of Louisville* (1908), 130 Ky. 611, 113 S. W. 855; *City of Louisville* v. *Louisville Home Telephone Co.* (1912), 149 Ky. 234, 148 S. W. 13; *Lutes* v. *Fayett Home Telephone Co.* (1913), 155 Ky. 555, 160 S. W. 179; *Bastin Telephone Co.* v. *Mount* (1917), 176 Ky. 26, 195 S. W. 112; *S. R. Schaff & Co. Inc.* v. *City of LaGrange* (1917), 176 Ky. 548, 195 S. W. 1097; *Irvine Toll Bridge Co.* v. *Estill County* (1925), 210 Ky. 170, 275 S. W. 634; *City of Ludlow* v. *Union Light, Heat & Power Co.* (1929), 231 Ky. 815, 22 S. W. (2d) 909; *Campbellsville* v. *Taylor County Telephone Co.* (1929), 229 Ky. 1843,

(*Home Telephone & Telegraph Co.* v. *Los Angeles* (1908), 211 U. S. 265, 273, 53 L. Ed. 176, 182) to enter into a contract with a utility, in reference to a franchise, fixing rates, thereby suspending the rate making power during the term of the contract under the contract clause of the United States Constitution (*St. Cloud Public Service Co.* v. *St. Cloud* (1924), 265 U. S. 352, 68 L. Ed. 1050; *Railroad Commission* v. *Los Angeles Railway Corp.* (1929), 280 U. S. 145, 74 L. Ed. 234). In such circumstances, any reduction in any of the plaintiff's wholesale prices would not be in the public interest but for the private benefit of the distributing purchaser thereby depriving the appellant of its property contrary to the due process clause of the Fourteenth Amendment to the United States Constitution (*Thompson* v. *Consolidated Gas Utilities Corp.* (1937), 300 U. S. 55, 81 L. Ed. 270).

Respectfully submitted,

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18 S. W. (2d) 305; *Kentucky Utilities Co.* v. *City of Paris* (1931), 237 Ky. 488, 35 S. W. (2d) 873, and *Central Kentucky Natural Gas Co.* v. *City of Lexington* (1935), 260 Ky. 361, 85 S. W. (2d) 870. Compare: *Paducah* v. *Paducah Railway Co.* (1923), 261 U. S. 267, 67 L. Ed. 647; *Union Light, Heat & Power Co.* v. *Railroad Commission* (E. D. Ky.—1926), 17 F. (2d) 143, and *Wright* v. *Central Kentucky Natural Gas Co.* (1936), 297 U. S. 539, 80 L. Ed. 850.

OPINION—Filed November 6, 1937.

Before HICKS, Circuit Judge, and HAMILTON and FORD, District Judges.

FORD, *District Judge:*

This is an action in equity filed by Petroleum Exploration, a corporation doing business in Kentucky but organized and existing under the laws of the State of Maine, to enjoin the Public Service Commission of Kentucky from enforcing or attempting to enforce compliance with an order of the Commission, pursuant to which the Commission proposes to inaugurate an investigation of the rates charged by complainant for gas transported by its pipe lines from its gas fields in Eastern Kentucky to the corporate limits of various Kentucky municipalities and there sold and delivered to certain public utility corporations.

The order complained of required the complainant to produce, at a public hearing before the Commission, evidence showing conclusively the fairness and reasonableness of its rates and charges, a complete statement of all contracts and working arrangements with its subsidiary corporations, if any, and to make available, for examination by the Commission's representatives, all its books, accounts, records, correspondence and memoranda.

At the time fixed for the hearing, the complainant appeared and offered a plea challenging the Commission's jurisdiction. The Commission overruled the plea and made an order fixing a later date for the proposed hearing and investigation. Before that time arrived, the complainant filed with the Commission an application for a rehearing on the jurisdictional question, together with an amended and supplemental plea which, on account of the institution of this action, has not been acted upon.

In addition to alleging diversity of citizenship and the value of the matter in controversy, required to sustain federal jurisdiction under section 24 of the Judicial Code (28 U. S. C. A. § 1), the bill further alleges, in substance, that the complainant, in transporting and selling its gas under contract to certain public utility corporations, is engaged

merely in an ordinary private commercial enterprise, that it is not a public utility and is not subject and can not be made subject to the regulatory jurisdiction of the Commission by any law which would be valid under the State or Federal Constitution. It charges that the obvious purpose of the Commission is to attempt, without right or authority of law, to lower some or all of the rates fixed under its existing contracts, and that the order, made with that end in view, is repugnant to the contract clause of the Federal Constitution and is in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The case is submitted upon complainant's motion for a temporary injunction to restrain enforcement of the order of the Commission. Permanent injunction is the ultimate relief sought.

Injunctive relief is an extraordinary remedy and "the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction." Cruickshank *v.* Bidwell, 176 U. S. 73, 80.

In State Corporation Commission of Kansas *et al.* v. Wichita Gas Company, 290 U. S. 561, it was asserted that a certain order of the State Corporation Commission of Kansas, made as a preliminary step toward ascertaining and fixing reasonable rates to be charged by a public utility, was repugnant to the Federal Constitution, and temporary and permanent injunction was sought. The court, in denying injunctive relief, said:

> "We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted."

It is further alleged in the bill, in substance, that the expense necessary to be incurred by the complainant in order to make the showing required by the Commission

would be approximately $25,000 and for the recovery of such expenditure, if made, the complainant would have no remedy and its great loss thereby suffered would be irreparable. It is to prevent such claimed irreparable injury that complainant asserts the right to equitable relief in this action.

The Act of the General Assembly of Kentucky, creating the "Public Service Commission of Kentucky", and fixing and defining its powers and functions (1934 Acts, ch. 145; Kentucky Statutes § 3952b–4) provides "The commission may compel obedience to its lawful orders by mandamus or injunctions or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction", and further (sec. 9), after prescribing penalties to be imposed upon utilities for neglect or refusal to obey "any lawful requirement or order made by the commission", the Act provides: "Whenever any utility is subject to a penalty under this Act, the commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty."

It thus appears that the Commission can do nothing more than institute mandamus proceedings against the complainant in a court of the state to compel observance of its order or certify facts to the Commission Counsel upon which he may base an action in the state court to recover the prescribed penalties. In either event, sole authority for making the Commission's orders coercively effective rests with the court in which such action may be instituted.

It is not shown by the bill that any court proceeding is pending or threatened. Should the Commission, however, apply to the court for mandamus to enforce compliance with its order or should the Commission Counsel institute a proceeding to recover the prescribed penalties, all questions as to the power or jurisdiction of the Commission, the regularity of its proceeding and all questions of constitutional right or statutory authority would then be open for examination and determination by the state court. If the complainant's contention that its rights, guaranteed under the Federal Constitution, would be infringed by en-

forcement of the order against it, be properly set up in such action and denied by the highest court of the state, adequate provision is made for review of the action of the state court by the Supreme Court of the United States (Judicial Code §237; 28 U. S. C. A. §344). Morgan *v.* Rogers, 284 U. S. 521, 526.

In Federal Trade Commission *v.* Claire Company, 274 U. S. 160, certain corporations challenged the constitutional validity of orders of the Federal Trade Commission requiring them to furnish monthly reports of the cost of production, balance sheets and other voluminous information relating to the business in which the complainant corporations were engaged, and sought by injunction to restrain the Commission from enforcing or attempting to enforce the challenged orders. The Court said:

> "There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.
>
> * * * Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction."

Since the Commission is powerless to coerce observance of the challenged order by inflicting penalties for disobedience or otherwise, and it is not shown that complainant's business or property rights are in any way threatened by any arbitrary action of the Commission, obviously, notwithstanding the Commission's order, the complainant may

passively stand upon its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the courts without, in the meantime, suffering any injury or damage or being compelled to incur any expense whatever. Boise Artesian Water Co. *v.* Boise City, 213 U. S. 276.

Equity jurisdiction to grant injunctive relief should be exercised only where "in a case reasonably free from doubt" it is shown that "intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." Cavanaugh *v.* Looney, et al, 248 U. S. 453, 456.

The defendant filed an answer to the bill on the merits without raising the question as to equity jurisdiction. It is pointed out, however, in Federal Trade Commission *v.* Claire Company, supra, that acquiescence of the parties is not enough to justify the court in assuming jurisdiction, and the want of equity jurisdiction, if obvious, may and should be objected to by the court, sua sponte. Twist *v.* Prairie Oil Company, 274 U. S. 684, 690; Singer Sewing Machine Co. *v.* Benedict, 229 U. S. 481.

We are of the opinion that the bill of complaint fails to state a case within the recognized sphere of federal equity jurisdiction, and the motion for temporary injunction should be denied.

By stipulation the case having also been submitted for final determination, the application for a permanent injunction should be likewise denied, and the bill dismissed for want of equity.

Judge HAMILTON, dissenting in part:

I agree with the conclusion of the majority opinion because the Act of May 14, 1934, Chapter 283, Section 1, 48 Stat. 775, U. S. C. A. Title 28, Section 41(1), withdraws from the jurisdiction of the District Courts of the United States suits enjoining the execution of orders of administrative boards or commissions where the laws of the State provide a plain, speedy and efficient remedy for a judicial review.

The laws of the Commonwealth of Kentucky provide for an adequate judicial review of the orders and findings of its Public Service Commission. (Carroll's Kentucky Statutes, 1936 Edition, Sections 3952-1 to 3952-61.) The plaintiff alleges in its petition that it does not come within the term "utility or utilities" as defined under Carroll's Kentucky Statutes, 1936 Edition, Section 3952-1, and for that reason this case does not fall within the bar of the Act of May 14, 1934; but I am of the opinion that this Act, being remedial in its nature, should be liberally construed in order that the Courts of the States may be left free to interpret their own statutes. It may be said, however, that the Public Utilities Act of the Commonwealth of Kentucky includes within its terms all persons, corporations, their lessees, trustees or receivers, producing, manufacturing, storing, distributing or selling natural or artificial gas for public consumption. The Act of May 14, 1934, cannot be avoided so as to confer jurisdiction on this Court by a naked allegation of the plaintiff that it is not one of the persons coming within the statutory law of the Commonwealth of Kentucky regulating public utilities.

The Commission, in its order, which the plaintiff seeks to enjoin in this action, found that the plaintiff was a public utility and had authority to fix its rates. The language of the Act (48 Stat. 775) expressly prohibits District Courts from enjoining any order of a State rate-making body.

Lower Federal Courts are creatures of the Congress, and their powers are confined within the Acts bringing them into existence, and whatever may be their inherent power incident to jurisdiction, the Congress can take from them the authority to grant injunctions in rate making cases and confer such power on the Courts of the State, even though a Federal constitutional right is involved. Ex Parte Robinson, 19 Wall. 505; Bessette *v.* Conkey Company, 194 U. S. 324; Michaelson *v.* United States, 266 U. S. 42, 66; Gillis, Receiver, *v.* California, 293 U. S. 62, 67.

If the majority opinion be correct, the Act of May 14, 1934, was wholly unnecessary, because in no event would the Federal Court enjoin the orders of a public utility rate making body if the State law provided an adequate judicial review.

The case of State Corporation Commission of Kansas *v.* Wichita Gas Company, 290 U. S. 561, 570, relied on in the opinion of the majority, has no application to the case at bar. In the cited case, the Commission sought to compel certain pipe line companies to disclose to it facts to be used in fixing the rates of the distributing companies. The order of the Commission sought to be enjoined did not fix rates, nor was it contended as a basis for relief that the Commission was without authority to inquire into the charges of the Wichita Company. The Court said:

> "The Commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 227. Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418, 452, et seq. But the decisions of state courts reviewing commission orders making rates are res adjudicata and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. Detroit & Mackinac Ry. *v.* Mich. R. R. Comm'n., 235 U. S. 402, 405. Napa Valley Co. *v.* R. R. Comm'n., 251 U. S. 366, 373. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas Court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. Bacon *v.* Rutland R. Co., 232 U. S. 134, 138. Missouri *v.* Chicago, B. & Q. R. Co., 241 U. S. 533, 542. Ex parte Young, 209 U. S. 123, 166. And upon the issue or confiscation vel non they are entitled to the independent judgment of the courts as to both law and facts. Ohio Valley Co. *v.* Ben Avon Borough, 253 U. S. 287, 289. Bluefield Co. *v.* Pub. Serv. Comm'n., 262 U. S. 679, 689. United Railways *v.* West, 280 U. S. 234, 251."

The plaintiff's suit here is based solely on the ground that the laws of the Commonwealth of Kentucky do not make it subject to the jurisdiction of the Public Service Commission for any purpose. It therefore follows that if plaintiff's contention be sound, it does not have to await the outcome of administrative action before resort to the Courts to determine its rights. The question in dispute is purely a legal one and is not affected to administrative decision. Gulf *v.* Interstate Natural Gas Company, 82 F. (2) 145, 150.

Federal Trade Commission *v.* Claire, 274 U. S. 160, 174, does not lend support to the conclusion of the majority. In that case, the Claire Company sought to enjoin an order of the Federal Trade Commission requiring it to submit reports concerning its business, under Section 6 of the Act creating it. The Commission's orders were enforceable only by requesting the Attorney General to institute mandamus proceedings against the recalcitrant, or by supplying him with facts necessary to enforce forfeitures. Any proceeding to compel compliance or to recover forfeitures could only be had in the United States District Court on the law side of the docket. The Court refused to grant equitable relief on the ground it had adequate remedy at law in the Federal Courts by presenting its defense to the mandatory or penalty action when instituted.

I have always understood the rule to be that the adequate remedy at law which defeats equitable jurisdiction must be such remedy in the Federal Courts, and not in the State Courts, and it must be a remedy which the Federal Courts can administer under the circumstances of the particular case, and any doubt as to the law remedy must be resolved in favor of the equitable.

The Courts have universally held that Federal Equity jurisdiction is to be tested by those rules, principles and usages as administered by the Federal Courts immediately after the adoption of the Constitution, unaffected by State statutes or practices, regardless of the antiquity of the remedy at law in the State Courts. In other words, a case cognizable by a Federal Court of Equity for inadequacy of legal remedy is still such a case regardless of State legis-

lation or practice enlarging legal remedies, and continues thus until the Congress deprives the Federal Courts of jurisdiction.

The majority opinion, without stated legal justification, and misapplying the Claire case, relegates the plaintiff for relief to the Franklin Circuit Court of the Commonwealth of Kentucky, because of the provisions of the Kentucky Statutes, 1936 Edition, Sec. 3952-44.

In the case of Smyth *v.* Ames, 169 U. S. 466, 550, the Court said:

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

When the violator is an individual the penalties for failure to comply with the orders of the Public Service Commission are not more than $1,000.00, or confinement in jail for not more than six months, or both, and if a corporation, not less than $25.00 or more than $1,000.00 for each violation, the enforcement thereof to be by the Franklin Circuit Court of the Commonwealth of Kentucky.

In the case of Western Union Telegraph Company *v.* Andrews, 216 U. S. 165, 167, the Court, quoting from Ex parte Young, 209 U. S. 123, 155, said:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional

act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

The case of New Hampshire Gas & Electric Company *v.* Morse, 42 F. (2) 490, 495, is directly in point. In that case the Court said:

> "It is not reasonable to hold that a person must violate a law and subject himself to possible fines or imprisonment in order to contest the constitutionality of a statute authorizing the imposition of a penalty. Threats of the constituted authorities are sufficient to set in motion an action to contest such rights. Western Union Telegraph Company *v.* Andrews, 216 U. S. 165, 30 S. Ct. 286, 54 L. Ed. 430."

Compare also: Risty *v.* Chicago, R. I. & Pacific Railway Company, 270 U. S. 378, 390; City of Fort Worth *v.* Southwestern Bell Telephone Company, 80 F. (2) 972; DiGiovanni *v.* Camden Fire Insurance Association, 296 U. S. 74; Grandin Farmers Cooperative Elevator Company *v.* Langer, 5 F. Supp. 425, affirmed 292 U. S. 605; City of Commerce *v.* Southern Railway Company, 35 F. (2d) 331; Los Angeles Railway Company *v.* Railroad Commission of California, 29 F. (2) 140.

For the reasons herein stated, I find myself unable to agree with the majority opinion.

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